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No. 806

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

TOMMY AND PRESTON BELLEW ..... *Appellants*

versus

STATE OF MISSISSIPPI ..... *Appellee*

(Appeal from the Supreme Court of the State of Mississippi)

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI.

MRS. CLARE SEKUL HORNSBY,
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and
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 806

TOMMY AND PRESTON BELLEW ..... *Petitioners*

versus

STATE OF MISSISSIPPI ..... *Respondent*

(Appeal from the Supreme Court of the State of Mississippi)

PETITION FOR WRIT OF CERTIORARI.

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Mississippi, entered in the above-entitled appeal case on November 3, 1958, in which Suggestions of Error were overruled by the Supreme Court of Mississippi on December 15, 1958, causing said judgment of said state court to be and become a final judgment.

OPINIONS BELOW

The opinion of the Supreme Court of Mississippi, dated November 3, 1958, is not yet reported in the official state reports, but is reported in 106 So. 2d 246. Copy of said opinion is attached to the jurisdictional statement in this appeal case, as Appendix "A". No written opinion was rendered by the Supreme Court of Mississippi in overruling petitioners' suggestion of error and additions (amendments) to said suggestion of error.

JURISDICTION

The judgment of the Supreme Court of Mississippi was pronounced on November 3, 1958, and entered of record in Minute Book "BL", page 542, on November 3, 1958. Suggestion of error and additional (amendments) to suggestion of error were overruled on December 15, 1958, and entered in Minute Book "BL", page 561. Said judgments appear as appendages to the jurisdictional statement. Notice of appeal to the Supreme Court of United States was filed in the Supreme Court of Mississippi on December 16, 1958, and service made on the Attorney General of Mississippi on that date. This appeal case was docketed and jurisdictional statement filed in this Court on March 30, 1959, pursuant to authority of Order signed by Mr. Justice Hugo L. Black on March 13, 1959, extending the time to and including April 1, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. A. § 1257(3). This petition for writ of certiorari is filed and docketed in the above-entitled appeal cause of Tommy and Preston Bellew, Appellants, v. State of Mississippi, Appellee.

QUESTIONS PRESENTED

1. Whether the proceedings against petitioners in the trial court of Harrison County, Mississippi, eventuating in verdict and judgment convicting them of the crimes of harboring and concealing an escaped prisoner, so far depart from the accepted course of judicial procedure as to call for review by the Supreme Court of the United States, on the ground that appellants were denied procedural due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and resulted in an unfair trial of petitioners.

2. Whether the state statutes involved in this proceeding, Sections 677 and 2142.5, Mississippi Code of 1942, as construed and applied against appellants by the state courts, including the Supreme Court of the State of Mississippi, were enlarged by intendment, and as so enlarged and expanded, deprive appellants of due process of law and the equal protection of the law, guaranteed against abridgment by the Fourteenth Amendment to the Constitution of the United States.

3. Whether the affirmance of petitioners' conviction of the crimes of harboring and concealing Dale Morris, an escaped prisoner, then awaiting trial for murder, resulted in an expansion of the state statutes, by including acts and conduct not encompassed within said statutes, and as thus construed and applied said state statutes, Sections 677 and 2142.5, Mississippi Code of 1942, Recompiled, violate the Constitution of the United States, providing for due process of law and the equal protection of the law, and requiring persons charged with crime to be advised and apprised of the charge(s) against them, and not be convicted of crimes and offenses not included within, but rather beyond the purpose and intent of the legislative enactments.

4. Whether the words "harbor" and "conceal" contained in and a part of Section 2142.5, Mississippi Code of 1942, Recompiled, have any reasonable relation to the actions and conduct attempted to be proved, and proved, against appellants, and whether the said statute, as construed and applied against petitioners, deprive them of due process of law and the equal protection of the law, guaranteed to them by the Fourteenth Amendment of the Constitution of the United States, because the proof, such as it is against petitioners, fails to show that they treated one Dale Morris, the said escaped prisoner as a guest

in their homes, or elsewhere, and that petitioners did anything concerning the said Dale Morris that could, and did, in fact, remotely approach the meaning and intendment of the words "harbor" and "conceal" as defined by all the lexicographers and by the case law of the United States, both state and Federal; and more particularly, because the whole cases of the State of Mississippi against petitioners is to the effect only that they obtained, or caused to be obtained, food and bedding for said escaped prisoner, and that one of the petitioners, viz: Preston Bellew, indicated where he, the said escaped prisoner, might hide and remain in the "woods" some considerable distance from the home of the said Preston Bellew.

5. Whether the words "or by imprisonment in the penitentiary not to exceed five (5) years," following the words "upon conviction shall be fined not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00)," in Section 2142.5, Mississippi Code of 1942, Recompiled, constitute and result in a causus omissus which may not be supplied by the courts, since a convicted criminal may not be "fined * * * by imprisonment * * *," but may only be punished by imprisonment—the omission of the words "be punished" from said statute destroying the attempted grant of authority to imprison any person "who shall knowingly conceal or harbor" any such prisoner, etc., and whether the Legislature of Mississippi conferred any power and authority on the Courts or juries to fix such punishment in the penitentiary.

6. Whether the omission of the words "be punished" from Section 2142.5, Mississippi Code of 1942, Recompiled, between the words "or" and "by imprisonment," removes violations of said Section 2142.5 from the mean-

ing and intendment of Section 677, Mississippi Code of 1942, Recompiled, defining a "felony" under the Law of Mississippi, as "any violation of law *punished* with death or confinement in the penitentiary," and causes said statutes, Sections 677 and 2142.5, Code of 1942, Recompiled, as construed and applied against petitioners by the Supreme Court of Mississippi, to be and become unconstitutional, and null and void, and violate the Fourteenth Amendment to the Constitution of the United States, and deprive petitioners of due process of law and the equal protection of the law.

7. Whether the sentence of petitioners by the trial judge, affirmed by the Supreme Court of Mississippi, to "three years at hard labor in the (state) penitentiary," is void or voidable, and if the latter may said sentence be corrected and a proper sentence be imposed by fine of not less than $100.00 or more than $500.00.

CONSTITUTIONAL PROVISIONS INVOLVED

The due process clause and the equal protection of the law clause of the Fourteenth Amendment of the Constitution of the United States.

STATEMENT OF THE CASE

I. Procedural History of the Case.

Petitioners were charged with violation of Section 2142.5 of the Mississippi Code of 1942, Recompiled, providing that: "Every person who shall knowingly conceal or harbor any prisoner or convict who has escaped from the lawful custody of any officer, jail, prison, or the penitentiary, within this state shall be guilty of a felony and upon conviction shall be fined not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00) *or by imprisonment* in the penitentiary not to exceed five (5) years." Section 677 of the Mississippi

Code of 1942, Recompiled, provides that: "The term 'felony' when used in any statute, shall mean any violation of law punished with death or confinement in the penitentiary." A trial was had in the circuit court of Harrison County, State of Mississippi, lasting four days, on an indictment which charged that "Peggy Goudelock, Preston Bellew, Tommy Bellew, Douglas Thomas and Ruth Johnson, did unlawfully, wilfully, feloniously and knowingly conceal and harbor one Dale Morris, an escaped prisoner, charged with the crime of murder, who had been confined as a prisoner awaiting trial for murder under the order of the Circuit Court of Hancock County, Mississippi," quoting from said indictment and the opinion of the Supreme Court of Mississippi. (See R. 2-3, and Exhibit "A" to Jurisdictional Statement of appellants filed in their appeal-case on March 30, 1959 from the final judgment of the Supreme Court of Mississippi.) After jury verdict of "guilty as charged" petitioners were sentenced to a term of three years at hard labor each in the state penitentiary, and costs were assessed against them. Their motions for new trial filed in the trial court were overruled without opportunity for hearing and argument.

The Supreme Court of Mississippi affirmed the judgment of conviction and sentence on November 3, 1958, and overruled petitioners' suggestion of error and amended (addition) to suggestion of error on December 15, 1958. Petitioners have no further remedy for appellate review in the state courts of Mississippi, and no remedy for the correction of the judgment and sentence pronounced against them.

II. The Facts Material to the Questions Presented.

The petitioners' brother, Aden Bellew, was incarcerated in the Harrison County jail at the time one Dale

Morris, a prisoner awaiting trial on a charge of murder, escaped and made his way into a wooded section in the country in north Harrison County, on the night of June 6, 1958. The details of the escape of Dale Morris and his subsequent recapture, are not material here, except insofar as they bear on the question of admissibility of evidence against petitioners. The same is true as to the charge against and confinement of petitioners' brother. However, because the contention is made that petitioners were denied procedural due process of law in their trial and conviction, it is necessary to refer to the evidence on behalf of the state, and show that the prosecution was permitted, over objection, to detail and parade before the court and jury evidentiary facts concerning the crimes charged against Dale Morris, Aden Bellew, and co-indictees of petitioners, and the prosecution to argue that "Dale Morris killed a man and they gave him a gun." That's the testimony. (R. 415)

The evidence on behalf of the respondent was to the effect that on the night of the escape of said Dale Morris from the county jail in Gulfport, Mississippi, petitioner Preston Bellew, with one Douglas Thomas, met the escapee in a wooded section in the northern portion, or part of Harrison County and indicated to him where he might hide in the woods some three quarters of a mile from the home of said Preston Bellew, and that Preston Bellew furnished him groceries "and things." Further, that besides furnishing food and water Preston Bellew had many talks with said escapee concerning things of common interest and his, the escapee's, plight. Petitioner Tommy Bellew did nothing until the last week or ten (10) days of the escapee's stay at his, the escapee's hiding place in said wooded area. Tommy Bellew allegedly had three or four conversations with the escapee, Dale Morris,

and with petitioner Preston Bellew and others, during which the state's witnesses testified Tommy Bellew suggested plans and means to enable the escapee to make a getaway from his camp-site. These conversations were said to have taken place elsewhere and away from the site, with the exception of one occasion when a co-defendant, Peggy Goudelock, said she saw both petitioners talk with the escapee Morris near the site but she said she was some distance away. Another co-defendant, Ruth Johnson, the person who planned, with others, and executed the escape of Dale Morris, was said to have requested Petitioner Tommy Bellew to help her move some of the escapee's clothes from the house to an old automobile a short distance behind it. The house in which the Johnson woman was living at the time was more than a mile from the location of the escapee's hiding place in the woods. Petitioner Preston Bellew, it was testified by state's witnesses, led the escapee in an automobile to a highway to the west in order that he, the escapee, could travel to evade capture..

Petitioners strongly and steadfastly denied their guilt, and any participation in any way in the concealing or harboring of the escapee, Dale Morris, or of doing any acts which could, or would, involve them, and they produced evidence and witnesses to establish an alibi, accounting for their time and whereabouts for every day and practically every minute of every day of the period the said escapee remained in the wooded area some three quarters of a mile, or so, from the home of petitioner Preston Bellew, and petitioners supported their position and contentions with testimony of good character and reputation.

No proof was made by the state that petitioners treated the escapee, Dale Morris, as a guest in their home, or elsewhere; and no evidence was introduced to show, and

prove, that petitioners protected the said Dale Morris, or that they furnished him shelter, lodging, and entertainment, or that petitioners gave the said Dale Morris refuge, cared for and protected him. No proof was made, or offered to be made, that petitioners performed any physical acts tending to the secretion of the body of the escapee Dale Morris. Nevertheless petitioners were convicted of the crime(s) of "harboring" and "concealing" the said Dale Morris, and their conviction and sentence were affirmed by the Supreme Court of Mississippi.

III. The Federal Questions Raised Below in the Trial Court and Before the Supreme Court of the State of Mississippi.

(A) In the Trial Court: (Motion for New Trial)

For further ground in support of their motion for new trial, petitioners contended that Section 2142.5 of the Mississippi Code of 1942, Recompiled, was unconstitutional in that said law in substance contained two crimes, one of concealing and the other of harboring, and does not describe the acts or things necessary to sustain such charges, and in (no) way affords petitioners information necessary to prepare their defense, and deprived them of due process of law as provided by the Constitution of the State of Mississippi and by the Constitution of the United States, and contended their conviction thereunder was invalid, void and of no legal effect.

(B) In the Supreme Court of Mississippi. (Original Brief, Suggestion of Error, and Addition (Amendments) to Suggestion of error)

In support of their suggestion of error in the opinion of the Supreme Court of Mississippi petitioners urged and showed that the statute, Section 2142.5, Mississippi Code of 1942, Recompiled, as construed and applied against

them, is unconstitutional, null and void, and violates the Fourteenth Amendment to the Constitution of the United States, and said they were denied due process of law and the equal protection of the law. They contended and showed that the indictment returned against them, and their co-defendants named in said indictment, did not charge a crime; that the statute under which such indictment was brought, Section 2142.5, Code of 1942, Recompiled, was extended by intendment according to the opinion of the Court and by the verdict of the jury and the judgment of the trial court, and as so extended is unconstitutional, and violates the Fourteenth Amendment to the Constitution of the United States. Petitioners contended that Section 2142.5, Code of 1952, Recompiled, as construed and applied against them, violated the Fourteenth Amendment to the Constitution of the United States, in that it denied petitioners due process of law and the equal protection of the law. Petitioners showed that the actions and conduct testified to against them by state witnesses, did not remotely prove harboring and concealing of Dale Morris, the escaped prisoner, by petitioners as the words "harbor" and "conceal" are defined by the lexicographers and decided cases, both state and Federal, and urged that since Section 2142.5, Code of 1942, Recompiled, imposes punishment as for a misdemeanor and for a felony, it must be considered to be a misdemeanor only, because the statute fails to give either the court or the jury any discretion in the matter of fixing such punishment.

ARGUMENT

I. Procedural Due Process of Law—Right to Fair and Impartial Trial.

(a) The admission of evidence for or against the accused must be according to the established procedure or

rules of practice in each state in similar cases, and the punishment inflicted must be authorized by law.

The trial court admitted evidence, over the objection of petitioners, of the commission of other and different crimes and offenses by co-defendants, co-indictees, of petitioners, the furnishing of guns to Dale Morris, the escaped prisoner, of conversations by and between persons other than petitioners, out of the presence and hearing of petitioners, and at times when petitioners could not possibly have been present: and likewise admitted in evidence over the objection of petitioners testimony regarding their brother, Aden Bellew, then a prisoner in the Harrison County jail, and concerning the aiding and abetting the jail escape of Dale Morris, and having reference to the escape of Morris. Such evidence did not bear on the guilt or innocence of petitioners, and did not form part of a chain of facts so intimately connected that the whole must be heard in order to interpret its several parts, as held by the state court. Petitioners were not charged with conspiracy to violate Section 2142.5, Code of 1942, Recompiled. The admission of such evidence against petitioners was contrary to established procedure and rules of practice in Mississippi. Beginning with the early case of Dyson v. State, 25 Miss. 362, the state court has consistently held that the necessity for enforcing the rule that no evidence can be admissible which does not tend to prove or disprove the issue joined is much stronger in criminal than in civil cases. In Harper v. State, 83 Miss. 402, 35 So. 572, the state court held that in a prosecution for murder no testimony should be admitted which does not shed some light upon the acts of defendant, or in some way tend to support the hypothesis upon which the state seeks to justify his conviction, and which does not constitute admissions showing

a guilty knowledge, confessions of guilt, or declarations against interest.

The other offenses testified about by state witnesses were not, and do not pretend to be, part of the same transaction charged in the indictment against petitioners.

Although this Court held, in Lisenba v. People of State of California, 314 U. S. 219, 62 S. Ct. 280, 286, that the Fourteenth Amendment leaves California free to adopt a rule of relevance which the Supreme Court of that state held was applied in accordance with the state's law, we note the limitation of the rule as announced in the Court's opinion, and believe the Court will now rule that such principle is applicable only to cases where the disconnected acts are shown to establish intent, design, and system, on the part of the defendants themselves; and not as concerns others, about which defendants have no causal connection.

The decision of the state court against petitioners denies them procedural due process, according to the established procedure and rules of practice in Mississippi, as announced in Whitlock v. State of Mississippi, 6 So. 237; Brown v. State, 72 Miss. 997, 17 So. 278; Benoit v. City of Bay St. Louis, 103 Miss. 218, 60 So. 137; Collier v. State, 106 Miss. 613, 64 So. 373; Baygent v. State, 144 Miss. 442, 110 So. 114; McLin v. State, 150 Miss. 159, 116 So. 533; Willoughby v. State, 154 Miss. 653, 122 So. 757, 63 ALR 1319; Floyd v. State, 166 Miss. 15, 148 So. 226; Gunter v. State, 180 Miss. 769, 178 So. 472; Kehoe v. State, 194 Miss. 339, 12 So. 2d 149; Crafton v. State, 200 Miss. 10, 26 So. 2d 347; Augustine v. State, 201 Miss. 277, 28 So. 2d 243; Walker v. State, 201 Miss. 780, 30 So. 2d 229; Scarbrough v. State, 204 Miss. 387, 37 So. 2d 748; Patton v. State, 209 Miss. 138, 46 So. 2d 90; Dossett v. State, 211 Miss. 650, 52 So. 2d 490; Bennett v. State,

Miss., 52 So. 2d 837; Tanner v. State, 216 Miss. 150, 61 So. 2d 781; Pegram v. State, Miss., 78 So. 2d 153; Hawkins v. State, Miss., 80 So. 2d 1, and Brown v. State, Miss., 80 So. 2d 761, holding that evidence in a criminal case must be confined to the point in issue, and proof of crimes distinct from that alleged in indictment should not be admitted in evidence against accused, excepting only when such evidence of other crimes tends directly to establish the particular crime.

For the asserted error it is respectfully submitted that petitioners did not have a fair and impartial trial.

Petitioners will show under Point III of their argument that the punishment inflicted on them by the state courts was not authorized by law.

II. CERTIORARI SHOULD BE GRANTED IN THE INSTANT CASE BECAUSE IMPORTANT QUESTIONS AFFECTING LAW ENFORCEMENT AND THE RIGHTS OF PETITIONERS (ACCUSED) UNDER THE FOURTEENTH AMENDMENT ARE INVOLVED: The doctrine of the Winters v. New York, Chaplinsky, Resnick and Weitzel Cases needs amplification in its application to the extension and expansion of state statutes by intendment.

Section 2142.5, Mississippi Code of 1942, Recompiled, provides:

"Every person who shall knowingly conceal or harbor any prisoner or convict who has escaped from the lawful custody of any officer, jail, prison, or the penitentiary, within this state shall be guilty of a felony and upon conviction shall be fined not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00) *or by imprisonment* in the peni-

tentiary not to exceed five (5) years." (Emphasis supplied)

Since the indictment returned against appellants, R. 2, charges that "* * * * Preston Bellew, Tommy Bellew (and others), * * * did * * * conceal and harbor one DALE MORRIS, * * *." it is necessary to a full understanding and appreciation of the Legislative intent, to examine into the meaning—the definition— of the words "conceal" and "harbor" as used in the state statute. Section 2142.5, Code of 1942, Recompiled.

In the early case of Fitzgerald v. Brophy, 1 Pa. Co. Ct. R. 142, the court held that "harboring" means protecting, and said that a defendant does not harbor a stray dog, so as to be liable for injuries inflicted by it, by merely permitting such dog to live under a building in his coalyard. The defendant there did more than petitioners here—he permitted the dog to live under a building in his, the defendant's coal-yard. In this appeal-case Dale Morris, the escaped prisoner lived out "in the woods," a great distance from the home of Preston Bellew. Within the intendment of the statute, as decided by the Court in the Fitzgerald v. Brophy Case, supra, there could be no "harboring" of Morris in the woods. In State v. Pringle, 147 Wash. 555, 266 P. 196, 197, the court held that furnishing a shelter, lodging, and entertainment to an escaped prisoner with knowledge of all the facts thereof, though constituting "harboring," was not sufficient to constitute concealment of the prisoner or harboring for the purpose of concealment, under Rem. Como. Stat. § 2346. It follows there was no concealment of Morris according to the evidence in the case against petitioners. And, too, there may be no harboring for purpose of concealment in the case against petitioners. In State v. Modlin, 197 Mo. 376, 95 SW 345, 346,

the court said that "harboring theives" means to give them shelter or lodging, or entertain them as guests. Under the facts of the case against petitioners, there was no "harboring" of Morris, the escapee, since he was not given shelter or lodging, and he was not entertained as a guest. In Dennis v. State, 230 Ind. 210, 102 NE2d 650, 653, the court said that the word "harbor" as used in the statute defining accessory after the fact meant to shelter, to give refuge, to lodge, care for and protect any person guilty of a felony. The proof, such as it is is against petitioners, does not show that Dale Morris, the escaped prisoner, was given shelter, refuge, cared for and protected. Morris was "out in the woods" some 3/4 of a mile—a great distance from the home of petitioner Preston Bellew. In Firpo v. United States, C. C. A. N. Y., 251 F. 850, 853, the court held that to "harbor" as used in Criminal Code § 42, 18 U. S. C. A. § 94, providing for punishment of any one who shall harbor, conceal, protect, or assist any soldier who has deserted from service, meant to lodge, to care for, after secreting the deserter. The evidence, such as it is against petitioners Tommy and Preston Bellew, does not even pretend to show that petitioners lodged Morris, the escapee, and that they cared for him, after it is said he was secreted; and secreted where, in the "open" woods? In Herrera v. United States, C. A. Cal., 208 F. 2d 215, 218, the Court held that "harbor" means to afford lodging to; to entertain as a guest; to shelter, to receive; to give refuge to; to contain; to indulge or cherish (a thought of feeling); now usually with reference to evil, especially unlawful, act or intent. The evidence against petitioners, such as it is, does not remotely prove, or even suggest, that petitioners, or either of them, sheltered, received, gave refuge to, contained, indulged or cherished, Morris, the escaped prisoner. In United States v. Shapiro, C. C. A. N. Y., 113 F. 2d

891, 893, construing the statute penalizing any person who may "harbor" or "conceal" any person for whose arrest a federal warrant had been issued, the court held that the words "harbor" and "conceal" refer to some physical act tending to the secretion of the body of the offender, and mean to hide, secrete, or keep out of sight or to lodge or care for, after secreting the deserter, and said that the payment of money to a fugitive so that he may shelter, feed, or hide himself, is not within the accepted meanings of the words "harbor" and "conceal," as contained in Criminal Code, § 141, 18 U. S. C. A. § 246. The evidence, such as it is against petitioners, falls far short of proving the acts held by the Court, in United States v. Shapiro, supra, to be necessary to constitute the crime denounced by the statute, and the proof, such as it is against petitioners, falls far short of proving the crime or crimes intended by the Legislature of Mississippi, since the words "harbor" and "conceal" must be construed in their ordinary common use and meaning. In Tygard v. Falor, 163 Mo. 234, 63 SW 672, 674, the court held that "conceal" merely means not letting come to observation, and said that the word does not charge a criminal act. In Susnjar v. United States, C. C. A. Ohio, 27 F. 2d 223, 224, the court held that under Immigration Act, § 8 (8 U. S. C. A. § 144), prohibiting concealing or harboring, or attempt to conceal or harbor, or assist or abet others to conceal or harbor, any alien, etc., word "harbor" means to clandestinely shelter, succor, and protect improperly admitted aliens, and the word "conceal" meant to shield from observation and to prevent discovery of such alien persons. In the case against petitioners, the evidence, such as it is, falls far short of coming within the meaning of the words "harbor" and "conceal" as disclosed by all the decided cases.

Section 2142.5, Mississippi Code of 1942, Recompiled, was extended and expanded by intendment, and as thus construed and applied against petitioners by the state court, it is unconstitutional, and violates the Fourteenth Amendment to the Constitution of the United States.

As said by the Court in United States v. Williams, 341 U. S. 70, 71 S. Ct. 581, criminal statutes should be given the meaning their language most obviously invites, and their scope should not be extended to conduct not clearly within their terms. See also 14 Am Jur 776. In United States v. Weitzel, 246 U. S. 533, 38 S. Ct. 381, the Court held that statutes creating and defining crimes are not to be extended by intendment because the court thinks the Legislature should have made them more comprehensive, citing Todd v. United States, 158 U. S. 278, 15 S. Ct. 889, and United States v. Harris, 177 U. S. 305, 20 S. Ct. 609, 610.

It is now well settled that due process of law may be denied persons charged with crime by extending and expanding criminal statutes beyond their scope and context, since for an act to constitute a crime it must come within both the letter and spirit of the act. These principles are so universally accepted as to require no further citation of authority.

Section 2142.5, Code of 1942, Recompiled, as construed and applied by the state court against petitioners, denies them the equal protection of the law of the State of Mississippi, and violates the Equal Protection of the Law clause of the Fourteenth Amendment to the Constitution of the United States.

Beginning in the year 1908, with Hatton v. State, 92 Miss. 651, 46 So. 708, the state court has consistently held its function was to construe penal statutes as they

are enacted, and not to enlarge their scope to meet the gravity of each particular offense. Continuously since Stewart v. State, 95 Miss. 627, 49 So. 615, the state court has held that criminal and penal statutes are strictly construed, in favor of the accused and against the state. And without interruption since the state court's decision in State v. Traylor, 100 Miss. 544, 56 So. 521, sugn. of error denied (1912) 57 So. 1, the Supreme Court of Mississippi has held that while criminal statutes may be contracted or expanded by interpretation, so as to exempt from punishment those not within their spirit and purpose, such statutes cannot be expanded so as to impose punishment upon one not within their strict letter. The state rule has continued unabated through the decisions in Daisey Ratcliff v. State of Mississippi, decided December 15, 1958, not yet reported in the official state reports, but appearing in 107 So. 2d 728, and Mary Rose v. State of Mississippi, decided December 15, 1958, not yet reported in the official state reports, but appearing in 107 So. 2d 730. In the Ratcliff Case the state court said: (p. 730, 107 So. 2d)

> "• • • This is a plain requirement of the statute. It may be that the legislature intended to say 'incestuous or miscegenetic and void.' But this Court cannot amend the act so as to make persons subject to punishment thereunder who are not otherwise punishable by the express terms thereof.
>
> "It is settled law that penal statutes must be strictly construed. We must enforce the statute as written, not as we think the legislature might have intended to write it; for the question is not what the legislature intended to enact, *but* what is the meaning of that which it did enact. For an act to constitute a crime, it must come within both the letter and spirit of the act. • • •

> These principles are so universally accepted that no citation of authority is necessary. * * *. Reversed and appellant discharged." (Emphasis supplied)

The state court would enforce one rule for others and a different rule for petitioners. This is a violation of the equal protection clause of the Federal Constitution.

III. THE JUDGMENT SENTENCING PETITIONERS TO "THREE YEARS AT HARD LABOR IN THE STATE PENITETIARY" IS VOID, BECAUSE:

(a) Section 2142.5, Mississippi Code of 1942, Recompiled, as construed and applied against petitioners, is unconstitutional and violates the Fourteenth Amendment to the United States Constitution.

The state statute, as construed and applied against petitioners, denies them due process of law and the equal protection of the law, guaranteed against abridgment by state action.

(b) Section 677, Mississippi Code of 1942, Recompiled, providing that a "felony" is any violation of law *punished* with death or confinement in the penitentiary, means an imprisonment expressly authorized by law, either by directly providing for imprisonment in such penitentiary as a punishment for the commissoion of a particular offense, or by denominating the offense a felony and providing generally for such imprisonment of those convicted of felonies for which a specific punishment is not otherwise prescribed;

(c) The word "punished", like the word "punishable," as used in the phrase "punished with death or confinement in the penitentiary," in Section 677, Code of 1942, Recompiled, means liable to punishment or capable

of being punished by imprisonment in the state penitentiary.

(d) Section 2142.5, Mississippi Code of 1942, Recompiled, providing: "Every person who shall knowingly conceal or harbor any prisoner or convict who has escaped from the lawful custody of any officer, jail, prison, or the penitentiary, within this state shall be guilty of a felony and upon conviction shall be *fined* not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00) *or by imprisonment* in the penitentiary not to exceed five (5) years," (Emphasis supplied) does not directly authorize imprisonment in the state penitentiary, and no statute of the state of Mississippi provides generally for imprisonment in such penitentiary of persons convicted of felonies for which a specific punishment is not otherwise prescribed.

(e) A person guilty of a felony may not be fined * * * by imprisonment in the penitentiary * * *. The omission of the words "or be punished" or "be punishable" in Section 2142.5, Code of 1942, renders the sentence provision (requirement) of Section 2142.5, Code of 1942, ambiguous and void, and deprives petitioners of due process of law. The maximum penalty for violation of said Section 2142.5, Code of 1942, is a fine of not less than $100 nor more than $500.

(f) If the words "shall be guilty of a felony" are deleted from the statute, Section 2142.5, Code of 1942, no crime exists. Absent the words "be punished" or "be punishable" between "or" and "by imprisonment in the penitentiary" in Section 2142.5, Code of 1942, Recompiled, there is no express authorization of law for any imprisonment of persons guilty of harboring or concealing an escaped prisoner; and the Mississip-

pi Legislature has not provided generally for imprisonment in the penitentiary, or otherwise, of persons convicted of a felony for which a specific punishment is not otherwise prescribed.

(g) The words "shall be fined * * * *or by imprisonment* in the penitentiary * * *," as used in Section 2142.5, Mississippi Code of 1942, Recompiled, are incapable of construction and interpretation to effect a direct authorization of imprisonment in the state penitentiary.

A sentence pronounced by a court may be improper or illegal for various and sundry reasons. Such sentence may be void for lack of power to impose it. In 15 Am Jur 116, Criminal Law, Section 459, under the heading "Improper and Illegal Sentence," appears the following: (quote)

> "* * * A judgment of conviction under an unconstitutional law or a sentence imposed by a court without jurisdiction to pass such a sentence is not merely irregular or erroneous, but illegal and void. * * *."

In State v. Taylor (State ex rel. Parrish v. Coleman, Sheriff) 9 So. 2d 708, the Supreme Court of Florida said:

> "* * * The word 'punishable' may be defined as 'capable of being punished *by law or right.*' Webster's New International Dictionary. * * *." (Emphasis supplied)

In Ex parte Humphrey, 64 Cal. App. 572, 222 P. 366, 357, the court held that Pen. Code, § 19, providing a felony is a crime punishable with death or with imprisonment in the state prison, the term "punishable by imprisonment in the state prison," implies an imprisonment expressly authorized by law, either by directly providing for imprisonment in such prison as a punishment for the commission of a particular offense, or by denominating

the offense a felony and providing generally for such imprisonment of those convicted of felonies for which a specific punishment is not prescribed.

In re Jackson, 14 Blatchf. 245, 13 Fed. Cas. 194-197, the court held that the word "punishable," as used in a statute declaring that a violation thereof shall be punishable by a fine of not more nor less than a designated amount, indicates that a crime is intended, and not a pecuniary penalty to be recovered by a civil action.

In People v. Superior Court of City and County of San Francisco, 116 Cal. App. 412, 2 P. 2d 843, 844. the court said that the word "punishable" is defined as the deserving of or capable or liable to punishment * * * capable of being punished *by law or right* * * * said of persons or offenses. (Emphasis supplied)

In State v. Hacker, Mo., 214 S. W. 2d 413, 415, the court said that the word "punished' within statute making a subsequent offender punishable by imprisonment in penitentiary for longest term prescribed for first offense, if subsequent offense is such that upon conviction, defendant would be "punished" by imprisonment for limited term of years, was an inadvertent substitution for the word "punishable."

In Oveido v. Baldi, 152 Pa. Super. 340, 31 A. 3d 753, 754, and Commonwealth ex rel. Oveido v. Baldi, 347 Pa. 601, 33 A. 2d 12, 13, the courts said the word "punishable" as used in phrase "punishable by imprisonment in a state penitentiary" means liable to punishment or capable of being punished by imprisonment in a state penitentiary.

Section 2142.5, Mississippi Code of 1942, Recompiled, does not contain the words "punished" or "punishable",

and there is no direction to the court to inflict punishment upon those convicted of violation of such statute.

A peron may not be fined by imprisonment. The words of Section 2142.5, Code of 1942, require the imposition of a fine of not less than $100.00 nor more than $500.00, on persons convicted of violation of the statute, but there is no direction to punish such convicted persons by imprisonment in the penitentiary. The words "shall be fined * * * or by imprisonment in the penitentiary," as used in said Section 2142.5, Code of 1942, are too vague and uncertain and indefinite to permit imposition of sentence of petitioners at hard labor in the state penitentiary. The sentence imposed by the trial judge and affirmed and approved by the state Supreme Court, is illegal; it is void for lack of authority from the Legislature of Mississippi. Absent the words "be punished" or "be punishable" between "or" and "by imprisonment in the penitentiary" in Section 2142.5, Code of 1942, there is no express authorization of law for any imprisonment of persons guilty of harboring or concealing an escaped prisoner; and the Mississippi Legislature has not provided generally for imprisonment in the penitentiary, or otherwise, of persons convicted of a felony for which a specific punishment is not otherwise prescribed.

Since the Legislature of Mississippi only can prescribe punishment for violation of the criminal laws of the state, the trial court and the supreme court of Mississippi were powerless to sentence petitioners to the penitentiary of Mississippi.

In order to satisfy the requirements of constitutional law, and prescribe for definite and positive punishment for criminal acts, the Legislature, and not the courts, must in no uncertain terms provide for the punishment to

be prescribed and inflicted on persons convicted of violating the criminal laws of the state. Section 2142.5, Mississippi Code of 1942, Recompiled, is not only inaptly drawn, but omits direction to punish by imprisonment persons convicted of violating the statute by harboring and concealing escaped prisoners, etc. Insofar as the statute provides and prescribes punishment by fine of not less than one hunderd dollars ($100.00) nor more than five hundred dollars ($500.00), it is sufficient. But as a direction to impose punishment by imprisonment in the penitentiary, or otherwise, the statute fails to accomplish the purpose of directing such imprisonment.

In Joseph Mossew v. United States, C. C. A. 2d, 266 Fed. 18, 11 A. L. R. 1261, the court held that no conviction can be had for violation of a statute for which no penalty is provided. In the opinion, by Manton, Circuit Judge, as appears on pages 1263, 1264, and 1265, 11 A. L. R., it is said: (quote)

> "Section 4 declares it unlawful to make any unjust or unreasonable rate or charge in handling or dealing in necessaries, but there is no provision for punishment of this particular act thus made unlawful. As to other offenses which are denounced by the act, for the doing of which acts the section makes it unlawful, a penalty is prescribed; but nowhere in the act is a penalty prescribed for doing any of the acts made unlawful by this section, and there is no general provision in the act announcing a penalty or prescribing punishment for a violation of these provisions, where no specific penalty or punishment is provided. It further appears that this alleged indictment charges certain acts as unlawful, that is to say, making an unreasonable and unjust charge for sugar; but no penatly or punishment for a violation of the statute is prescribed by a valid statute.

"We are of the opinion that no crime is charged in this indictment. Therefore the conviction, even though upon plaintiff in error's plea of guilty, is void. Payment of the fine cannot be deemed to be a voluntary contribution to the government, and has been held not to be a bar in a suit to recover. United States v. Rothstein, 109 C. C. A. 521, 187 Fed. 269; Durr v. Howard, 6 Ark. 461; Devlin v. United States, 12 Ct. Cl. 266. * * *."

In Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648, it was said: Congress "must first make an act a crime, *affix a punishment to it*, and prescribe what courts have jurisdiction of such an indictment, before any Federal tribunal can determine the guilt or innocence of the supposed offender," citing United States v. Hudson, 7 Cranch, 32, 3 L. ed. 259.

Paraphrasing Mossew v. United States, p. 1265, 11 A. L. R., by failing to provide a penalty for an infraction of Section 2142.5, Mississippi Code of 1942, Recompiled, as a felony, or to prescribe a punishment as for a felony, as to which see Sec. 677, Mississippi Code of 1942, Recompiled, where a "felony" is said to mean any violation of law *punished* with death or confinement in the penitentiary, the principal statute here involved, Section 2142.5, Code of 1942, Recompiled, does not denounce the unlawful act(s) although criminal, and punishable as a misdemeanor, as a felony, and it, they, cannot be punished as such by imprisonment in the state penitentiary.

Because of the lack of penalty, it was held in State v. Fair Lawn Service Center, 20 NJ 468, 120 A2d 233, that a person cannot be convicted as disorderly person and fined for violation of the Sunday observance law.

The sentence pronounced by the trial court, and affirmed by the Supreme Court of Mississippi, on November 3, 1958, confining petitioners to "three years at hard labor in the (state) penitentiary," is void for lack of power to impose it. Re Nielsen, 131 U. S. 176, 33 L. ed 118, 9 S. Ct. 672; Kachnic v. United States (C. C. A. 9th) 53 F. 2d 312, 79 A. L. R. 1366. In the Kachnic v. United States Case, supra, the court held that a sentence of imprisonment not within the power of the court to impose is void, though imposed to run concurrently with a valid sentence.

CONCLUSION

Wherefore, petitioners respectfully pray that a writ of certiorari issue to the Supreme Court of Mississippi, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment herein of said Supreme Court of the State of Mississippi be reversed by this Court, and for such other and further relief as to this Court may seem proper in the premises.

Respectfully submitted,

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Dated April 23, 1959.